UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION V

IN THE MATTER OF:	)	
Gary Development Company Gary, Indiana	)	DOCKET NO. RCRA-V-W-86-R-45
EPA I.D. NO. 077 005 916	)	JUDGE GREENE

RESPONSE TO MOTION TO DISMISS

Complainant U.S. Environmental Protection Agency ("U.S. EPA"), Region V, submits this Response pursuant to the Presiding Officer's Order of September 11, 1987.

In his opening statement at the public hearing in this matter, held September 9, 10, and 11, 1987, in Gary, Indiana, counsel for Respondent moved to dismiss the action on two grounds: 1) that U.S. EPA lacks authority to take an enforcement action in a state authorized to run its RCRA program, and 2) that Complainant is estopped from bringing this action by a consent order issued by the Environmental Management Board of the State of Indiana ("IEMB").1/

I. U.S. EPA RETAINS ENFORCEMENT AUTHORITY IN RCRA-AUTHORIZED STATES.

In support of its claim that U.S. EPA lacks jurisdiction to take an enforcement action in RCRA-authorized states. Respondent cites In the Matter of: Northside Sanitary

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1/ Relevant portions of the hearing transcript are attached hereto as Attachment 1.

Landfill, Inc., RCRA Appeal No. 84-4, in which the Administrator finds that:

> to the extent that Region V's response to comments [issued in conjuction with the denial of Petitioner's final RCRA permit] purports to make findings regarding whether or not the Old Farm Area must be closed, those findings are without legal effect, for any such findings are for Indiana to make pursuant to its Phase I authorization.

Northside at 5. (Attachment 2). In the Northside case, Northside Sanitary Landfill, Inc. was denied a RCRA permit by the State of Indiana and U.S. EPA.2/ In its response to comments to the permit application, U.S. EPA included an area known as the Old Farm Area in its definition of the facility. Since the facility was denied a permit, the State required it to close. Northside petitioned the Administrator of U.S. EPA to review U.S. EPA's comments including the Old Farm Area as part of the facility, so that Northside would not have to close the Old Farm Area. On appeal, the Administrator denied review of the comments, since U.S. EPA's response to comments are without legal effect. As an authorized state, Indiana, not U.S. EPA, is the proper authority to make closure determinations. The U.S. Court of Appeals for the Seventh Circuit upheld t'is interpretation, though dismissing the petition for lack of standing and ripeness, in Northside Sanitary Landfill, Inc. v. Lee M. Thomas, 804 F.2d 371 (7th Cir. 1986).

2/ Although the State of Indiana has authority to issue RCRA permits, it does not have authority to administer requirements imposed by the Hazardous and Solid Waste Amendments of 1984. Thus, permits including both RCRA and HSWA requirements are issued jointly by U.S. EPA and the State.

As clearly evidenced by the facts, the Northside cases concerned U.S. EPA's authority to review closure plans and make determinations regarding closure. They did not concern U.S. EPA's authority to take enforcement actions in an authorized state. In United States of America v. Conservation Chemical Company of Illinois ("CCCI"), Civil Action No. H 86-9, the United States District Court for the Northern District of Indiana considered precisely that issue and found that U.S. EPA has authority to take enforecment action in authorized states. (Attachment 3).

> These statutory provisions [Section 3008(a)(1) and (2)] could not be more clear. Even after a state received authorization to implement its own statutory scheme on hazardous waste "in lieu of the federal program," Congress intended for the [U.S.] EPA to retain independent enforcement authority in those states. When the EPA wishes to bring an action in a RCRA-authorized state, all that is required of the EPA is that it must first notify the state of its intent... The legislative history of RCRA echoes the obvious Congressional intent of concurrent federal enforcement.

CCCI at 22. The only prerequisite to U.S. EPA taking an enforcement action in an authorized state is notification of the state. As set forth in its Complaint, Complainant has notified the State of Illinois of this action.

The CCCI court distinguishes Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371 (7th Cir. 1986) as limited to restricting U.S. EPA's review of closure plans in authorized states.

> defendants misread the court's statement in an attempt to fashion a broad prohibition against [U.S.] EPA's enforcement authority. The Northside court was not concerned with an enforcement action, instead, it dealt with a party's standing and the EPA's authority under section 7006(b) of RCRA, 42 U.S.C. §6976(b). In this case, unlike Northside, the EPA is acting pursuant to its section 3008(a), 42 U.S.C. §6928(a), enforcement authority.

CCCI at 21. Administrative Law Judge Frank W. Vanderheyden reached a similar conclusion In the Matter of National Standard Company, RCRA-V-W-86-R30 and 31. (Attachment 4).

Since Complainant brings this action against Respondent pursuant to its enforcement authority under Section 3008 of RCRA, it is not precluded from doing so by virtue of the State of Indiana's authorization to run its RCRA program.

II. COMPLAINANT IS NOT ESTOPPED FROM BRINGING THIS ACTION BY IEMB's CONSENT ORDER.

Respondent also argues that Complainant is estopped from bringing this action by a Settlement Agreement and Recommended Agreed Order, Cause No. N-53, entered into by Respondent and IEMB on February 28, 1983. (Attachment 5). Respondent refers to three decisions by the United States Supreme Court to buttress its claim.

In Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981), the court restates the doctrine of res judicata as the court has defined that doctrine over the years:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgement on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.

452 U.S. at 398. The court also indicated that the "technical elements" of res judicata are "a final judgement on the merits... (involving) the same claims and the same parties." 452 U.S. at 399.

In Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), the U.S. Supreme Court overturned the Triplett doctrine that a determination of patent invalidity is not res judicata against the patentee in subsequent litigation against a different defendant. The court included only costly, complex patent litigation in this new "nonmutual" parties exception. In Parklane Hosiery Co. Inc. v. Shore, 439 U.S. 322 (1978), the court extended the Blonder-Tongue doctrine to all cases, thus abolishing the mutuality of parties requirement for res judicata in private litigation.3/

In the instant case, Respondent asserts that the settlement agreement entered into by itself and the IEMB, Cause No. N-53, somehow bars an enforcement action taken against it by U.S. EPA. In keeping with the cases above, the

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3/ Parklane also provides a concise definition of res judicata and collateral estoppel: "Under the doctrine of res judicata, a judgement on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgement in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." 439 U.S. 326, note 5.

doctrine of res judicata cannot apply here. Cause No. N-53 does not constitute a final judgement on the merits; it is a settlement agreement reached before trial. No issues were ever litigated. The same parties are not involved. U.S. EPA was not a party to Cause No. N-53. Nor was U.S. EPA a privy to that settlement agreement. U.S. EPA does not even have authority to be a party to Cause No. N-53, since "It is expressly agreed and understood that the provisions of this Recommended Agreed Order constitute a modification of Petitioner's modified Construction Permit No. SW133 and Operating Permit No. 45-2." Cause No. N-53, p.3. Both permits concern Respondent's operation as a sanitary landfill. U.S. EPA does not regulate sanitary landfills and does not issue permits for them; therefore, U.S. EPA could not be a party or privy to Cause No. N-53. Lastly, Cause No. N-53 and the present action do not arise from the same cause of action. Cause No. N-53 is a permit modification concerning solid waste disposal permit requirements; this action alleges violations of RCRA and concerns reguirements for managing hazardous waste.

Respondent does not state which issues it alleges are collaterally estopped. Complainant maintains that none can be, based upon United States v. Mendoza, 464 U.S. 154 (1979) which holds that nonmutual collateral estoppel cannot be asserted against the Government.

> the Government is not in a position identical to that of a private litigant... Government litigation frequently involves legal questions of substantial public importance... a rule allowing nonmutual

> collateral estoppel would subtstantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue...

464 U.S. at 159 and 160.

Thus, Cause No. N-53 meets none of the requirements for applicability of the doctrine of res judicata or collateral estoppel against this action. It is a settlement agreement, not a final judgement on the merits. It does not concern the same parties or their prives.4/ Concerns completely differently claims arising under a different statute. Cause No. N-53 can in no way estop Complainant from bringing this action.

CONCLUSION

In light of the clear meaning of Section 3008(a) of RCRA and the decision in CCCI, Complainant has jurisdiction to bring this action. Since Respondent has failed to demostrate that Cause No. N-53 meets the prerequisites for res judicata or collateral estoppel, this action is not barred by either of those doctrines. Therefore, the Presiding Officer should deny Respondent's Motion to Dismiss.

4/ "Privity requires, at a minimum, a substantial identity between the issues in controversy, and showing that hte parties in the two actions are really and substantially in interst the same" Sunshine Anthracite Coal v. Adkins, 310 U.S. 381 (1970).

Respectfully Submitted,

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Dated this 6th day of October, 1987.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the original of the foregoing Response to Motion to Dismiss to be hand-carried to the Regional Hearing Clerk and true and accurate copies of it be served as follows:

by EPA Pouch Mail to:

Honorable J.F. Greene
Office of Administrative Law
Judges (A-110)
U.S. EPA
Washington, D.C.

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Dated this 6th day of October, 1987.